UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

DAMON MONTEZ WILLIS, Plaintiff, vs. JASON SMITH, PAT STEFLIK, MATTHEW ROYSTER, and ELAINE FRENCH, Defendants.	No. C04-4012-MWB **REPORT AND RECOMMENDATION ON THE MERITS**

TABLE OF CONTENTS

I. INTRODUCTION

A. Procedural Background

On February 26, 2004, the plaintiff filed this action pursuant to 42 U.S.C. § 1983, alleging the defendants violated his constitutional rights in the handling of his mail. On July 2, 2004, Chief Judge Mark W. Bennett referred the case to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for review of the case and the submission of a report and recommended disposition.

A bench trial was held before the undersigned on November 30, 2004, in the Civil Commitment Unit for Sexual Offenders, Cherokee Mental Health Institute, Cherokee, Iowa ("CCUSO"). The plaintiff Damon Willis was present in person with his attorney, Patrick E. Ingram. The defendants Jason Smith, Pat Steflik, and Elaine French were present in person with their attorney, Assistant Iowa Attorney General Gordon E. Allen. The defendant Matthew Royster did not appear in person, but he also was represented by Mr. Allen.

Willis testified in the case on his own behalf. He also offered the testimony of Loren Huss and Harold D. Williams, both of whom are patients at CCUSO, and Marsha Sherod, a friend of Willis's. The defendants Elaine French, Patricia Steflik, and Jason Smith testified in person at the trial, and the defendant Matthew Royster testified by telephone.

The following exhibits were admitted into evidence:

Plaintiff's Ex. 1 - State of Iowa Department of Corrections, Division of Institutions, Policy and Standards relating to Periodicals, Newspapers, and Books, Policy No. IN-V-80, rev. June 1998.

Defendants' Ex. A - CCUSO Incident Report dated 1/21/04.

Defendants' Ex. B - Copy of Iowa Administrative Code Chapter 28, Policies for All Institutions.

Defendants' Ex. C - Copy of "The Lie Behind the Lie Detector," by G.W. Maschke & G.J. Scalabrini (3d digital ed.). **[NOTE: Court ordered this exhibit sealed, not to be disclosed to Willis absent further order of the court.]**

Defendants' Ex. D - Patient Handbook, Civil Commitment Unit for Sexual Offenders, Department of Human Services, State of Iowa, dated 8/15/03.

Defendants' Ex. E - Patient Handbook, Civil Commitment Unit for Sexual Offenders, Department of Human Services, State of Iowa, dated 4/1/04.

Defendants' Ex. F - Blank form, Request for CCUSO Staff Services.

The parties filed post-trial briefs. (Doc. Nos. 22 & 25) The court finds the case has been fully submitted, and turns to consideration of the merits.

At the outset of the trial, Willis clarified the relief he is seeking in this action. He is not seeking monetary recovery, but requests injunctive relief regarding the procedure to be followed at CCUSO with regard to the handling of patients' personal mail, the institution of a clear grievance policy, and delivery to him of the document entered into evidence as Defendant's Ex. C.

The material facts of this case are not in dispute. Before summarizing the facts, the court first will discuss the nature of Willis's confinement at CCUSO.

B. Nature of Willis's Confinement

Iowa law provides a procedure for the civil commitment of a person who meets the definition of a "sexually violent predator"; that is, someone who "has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent

offenses, if not confined in a secure facility." Iowa Code § 229A.2(11). When someone is "presently confined" in a correctional facility pursuant to conviction of a sexually-based offense, and such person is about to be released from custody, the Iowa Attorney General is notified. The Attorney General appoints a prosecutor's review committee to determine whether the person meets the definition of a "sexually violent predator." If the committee determines the person is a "sexually violent predator," then the Attorney General may file a petition to have the person adjudicated to be a sexually violent predator, resulting in civil commitment to a treatment facility such as CCUSO. *See* Iowa Code ch. 229A.

Willis served about fifteen years in prison after his conviction of a sexually-based offense. When the time came for his release from custody, the Attorney General filed a petition and had Willis adjudicated to be a sexually violent predator. He was civilly committed for treatment, and initially spent about two years at the Iowa Medical Classification Center in Oakdale, Iowa. He was moved to CCUSO in October 2003.

Willis's commitment will continue until the CCUSO staff determines he is no longer a danger to society. In his post-trial brief, Willis indicates most of the patients on the unit "have no realistic expectation of release," and they "are lifers." (Doc. No. 25, p. 1)

II. FACTUAL BACKGROUND

All of the defendants in this case are employed at CCUSO. Elaine French is secretary for CCUSO. She works directly for Jason Smith, who is Administrator of the facility. Pat Steflik is the unit's Clinical Director, responsible for overseeing and coordinating the treatment programming, and for supervising the therapists who provide the

treatment. Matthew Royster is a social worker who provides individual therapy to patients on the unit, as well as facilitating group therapy sessions.

This case arises from the defendants' decision to withhold from Willis a book that was sent to him in the mail by his friend Marsha Sherod. The book, marked as Defendants' Ex. C (sealed), is entitled "The Lie Behind the Lie Detector, 3rd digital edition." It was written by George W. Maschke and Gino J. Scalabrini, and is published by AntiPolygraph.org. The authors take the position that polygraphs are inherently unreliable and polygraphy must be abolished because "reliance on this latter-day trial by ordeal . . . is undermining – not strengthening – our national security." (Def. Ex. C, Foreword)

Willis testified he learned about the book from an article in "Psychology Today," a journal to which he subscribes. He explained that polygraphs are used routinely at CCUSO. Three polygraphs are administered when a patient first enters the unit, each covering a different area of deviant sexual behaviors. Then during the treatment process, patients are given what Willis referred to as "maintenance polygraphs," to determine whether a patient is being truthful in treatment and conducting himself properly on the unit. Polygraphs also might be used if a patient is accused of inappropriate behavior.

Because of the use of polygraphs in his treatment process, Willis wanted more information about the test. He became curious when he read that the book (Def. Ex. C) included opinions that polygraphs are "bunk." The journal article gave a website where the book could be downloaded for free. Willis called Marsha Sherod and asked her to download the book and mail it to him. She agreed, downloaded the book, and shipped it to Willis at CCUSO.

When Willis had not received the book after some period of time, he contacted Marsha again to ask about it. Marsha stated she had sent the book already. According

to Willis, Marsha contacted the shipper and learned the book had been delivered to CCUSO on or about January 21, 2004. Willis then began inquiring of the defendants and other CCUSO staff in an attempt to locate the book.

The parties' testimony differs somewhat on the chronology of the book's journey through the individual defendants' hands. It is undisputed that the book was delivered to CCUSO, and the package was opened outside of Willis's presence. The defendants stated their normal procedure was to open packages to check for contraband in the presence of the recipient, but because of the large numbers of packages arriving during the holiday season, the administration had found that practice to be unworkable and they had started opening packages outside the recipients' presence. All parties agree that a decision ultimately was made, in varying degrees of consultation with each of the defendants, not to deliver the book to Willis. The ultimate decision was made by Pat Steflik and Jason Smith. Matthew Royster and Elaine French both testified they glanced at the title of the book, but did not review its contents before passing it along to Steflik and Smith for a decision as to whether it should be provided to Willis.

Willis stated there is no grievance procedure in place that would have allowed him to seek review of the decision to withhold the book from him. He stated he did not receive any kind of written notice that the book had arrived and was being withheld. In addition, he stated that at a unit council meeting in December 2003, Smith had told the patients he wanted to get away from patients filing grievances and appeals because that was "a prison thing." Willis acknowledged there are request-for-service forms available on the unit (*see* Def. Ex. F), but he did not view those forms as grievance forms. Willis stated it was his understanding that once he had talked with Steflik and Smith, there was nothing else he could do to request review of their decision besides filing a lawsuit.

Steflik and Smith both testified they decided to withhold the book from Willis because its contents were, in their opinion, counter-therapeutic. Steflik testified polygraphs are "a very integral component" of the treatment program at CCUSO. She explained that a key factor in a patient's successful treatment is for the patient to be honest about all offenses and sexually deviant behaviors in which the patient has engaged and about which the patient fantasizes. In Steflik's opinion, the polygraph provides an objective measure as to a patient's honesty. She noted that if a patient fails a polygraph, the patient has an opportunity to retake it. She stated the polygraph results are used in evaluating a patient's progress in treatment and in making decisions about further treatment.

Steflik stated she and Smith showed the book (Def. Ex. C) to their polygrapher and he identified AntiPolygraph.org as being extremely biased against polygraphs. He noted the book contains a section on polygraph countermeasures, and he opined that type of information could seriously impact the effectiveness of polygraphs given to patients on the unit.

Steflik testified she decided the book should not be given to Willis solely on the basis of looking at the table of contents and talking with Smith and the polygrapher; she did not read portions of the book. However, when she was asked about specific sections of the book, she agreed there are portions of the book that likely would be appropriate for disclosure to Willis, such as information from a National Academy of Sciences report, and various governmental policies about the use of polygraphs. Steflik stated that in her opinion, patients are entitled to both sides of the argument regarding the validity of polygraphs, but she would withhold information about polygraph countermeasures.

Smith echoed what Steflik had said about the use of polygraphs in the CCUSO treatment program. He explained further that when patients know they will be

polygraphed and there are certain ramifications from the results of the test, the patients are more likely to be honest in their disclosures, and to make pre-polygraph admissions about their behavior and thoughts. He wants to encourage pre-polygraph admissions so patients can benefit from the treatment that is being offered to them. According to Smith, it is more important for patients to *believe* the polygraph is valid then for the test actually to be valid. In this respect, the polygraphs act similarly to a placebo for some patients, in that if the patient is worried about being caught in a deception, the patient may admit things before the test is administered.

Smith stated he looked through the book (Def. Ex. C), and noted it discussed not only countermeasures but also how a polygraph is conducted. Smith spoke with Rick Dolleslager, the unit's polygrapher, about his familiarity with the authors of the book. According to Smith, Dolleslager stated the authors had made considerable efforts to discredit polygraphs. He also noted that some of the polygraph procedures outlined in the book are not considered "mainstream" polygraph procedures and are no longer used. Nevertheless, Dolleslager opined that knowledge of those procedures could compromise the validity of polygraphs administered on the unit, which would require retesting, inconclusive results, and be a disruption to the operation of the facility.

Smith and Steflik both indicated Willis is intelligent and articulate, and he might be able to view both sides of the polygraph argument and come to a reasonable conclusion. But they were concerned that some of the other patients who have more distorted thinking might refuse to take a polygraph, or become angry and upset, if they were presented with the information in the book. Smith believed that if the book were given to Willis, it was likely the book would be seen by other patients on the unit.

Smith testified about the December 2003, meeting he had with all the patients at CCUSO. He stated one of the main issues he discussed was the unit's existing grievance

process. Smith did not like the grievance process because, according to Smith, every decision the unit supervisors made was being appealed to him, and he felt the bulk of the appeals were being made simply because the procedure was available, not because there was a basis for them. He found the procedure to be counter-therapeutic and not focused on treatment. To remedy the situation, Smith put into place a new procedure that would have patients go directly to their therapist to process their concerns. After discussing the matter with the patient, if the therapist felt the concern was legitimate, then the therapist could bring the concern to the treatment team, which consists of Smith, Steflik, the treatment program supervisors, and the treatment services director. If the patient was not satisfied with the therapist's response, then the patient could ask the treatment team to review the concern. The treatment team would discuss the matter, conduct any further investigation they deemed necessary, and make a decision on the matter. Smith noted the patients were very resistant to these changes in the grievance procedure because they were used to a correctional type of setting where the focus was not on treatment, but was more on the individual's needs and rights within that setting.

Willis received a Patient Handbook when he arrived at the unit (Def. Ex. D). The handbook included the following grievance procedure:

> CCUSO staff is expected to treat residents in a respectful manner and to behave professionally when performing their duties. They are required to enforce program rules and policies and these **rules and policies are not grievable matters**. However, if you feel that you have been wrongly treated by the program staff or treated in an unprofessional manner, you are encouraged to resolve this at the lowest level possible. You should first attempt to resolve it directly in an adult and mature manner with the individual whom you feel mistreated you. *If this fails, you should attempt to resolve it by submitting a written grievance and discussing it with their*

> *supervisor*. *If your grievance is not satisfactorily resolved within a week by the Supervisor, as a last resort, you may submit a detailed written grievance to the Director or the Director's designee who will make a final decision within three weeks of receiving it.* There is no appeal beyond this stage of the grievance process. You may take your complaint to the courts if you so choose.

(Def. Ex. D, pp. 17-18; emphasis in original) This handbook was still in effect at the time the book was mailed to Willis. However, Willis stated that based on Smith's statements at the December 2003, meeting, Willis believed the written grievance procedure was no longer available to him.

In April 2004, the handbook was revised, and it included the following grievance procedure, which currently is in place at CCUSO:

> All patients should be aware of the CCUSO rules and their corresponding sanctions in the Patient Handbook. If patients adhere to the rules and actively participate in treatment, they can progress through the program's phases and levels. If the rules of the program are not adhered to, then this creates an unsafe, counter-therapeutic environment and will slow patients' progress through treatment. Patients have the ability to discuss rules and sanctions they receive so that they can develop problem resolution skills and continue to gain insight into how their thoughts and actions impact themselves and others. The procedures below explain this process and how being treatment focused at CCUSO does not violate a patient's "due process".

(Def. Ex. E, p. 19) The procedure then sets forth separate steps for a patient to take depending on whether the patient's concern is an individual one, or is one affecting several or all patients. Among other things, the individual procedure provides as follows:

> If a patient violates a rule and receives a consequence from a staff person and disagrees that his action was a rule violation,

> then the patient should make arrangements to process the incident with his therapist. The processing with a therapist is essential to be sure the patient is able to demonstrate an understanding of both perspectives (patient's and staff member's) on the rule violation. Once this situation has been processed with the therapist, the therapist can then make a decision as to whether there is merit to refer to the treatment team for additional review. The therapist refers to the treatment team for review if there is some question as to whether the rule was violated or if the consequence does not agree with the Patient Handbook or the patient's treatment needs.
>
> . . . Once the treatment team reviews the patient incident, a decision will be made on whether the consequence remains imposed or if it is to be modified or rescinded. The staff member who implemented the consequence will be involved in the treatment team meeting and will be the one to review the decision with the patient.

(*Id.*, pp. 19-20) As Willis observed in his testimony, the above procedure does not appear to address a method by which a patient can raise concerns regarding the patient's rights. Rather, the procedure appears to address those situations where a patient is disciplined for a rule violation. Nevertheless, Smith and Steflik both testified this procedure was available to Willis to address the withholding of the book.

If the patient's concern affects several or all of the patients on the unit, the patient can discuss the concern at the Unit Meeting, after submitting a proposal to the treatment team for review. "This proposal should state clearly how the change they are requesting impacts treatment and any special circumstances that need to be considered so as to ensure the safety and treatment benefits for the patients." (*Id.*, p. 20) The treatment team reviews the proposal and provides a response at the monthly Administrator Unit Meeting

"or sooner." (*Id.*) Willis stated he did not make a request to discuss the issue regarding his mail at a Unit Meeting.

In the present lawsuit, Willis challenges the policy utilized by CCUSO staff in deciding not to deliver mail to a patient. He testified he was not notified when the book was delivered to CCUSO, and he did not learn the book had been delivered and was being withheld from him until he asked about it. He argues the defendants should not have opened his mail except in his presence, and he claims the defendants' mail handling practices violated his right to due process. He also complains that CCUSO has no established procedure that would have provided him a means to appeal the Administrator's decision. He seeks to have the court establish mail-handling policies and procedures that will protect patients' rights, and a grievance procedure that provides an opportunity for patients to challenge decisions to withhold their mail. Willis also argues the book, or at least portions of it, should be provided to him.

Willis's claims raise two issues for the court's determination in this case. The first issue concerns whether CCUSO's mail-handling policies and grievance procedures are constitutional. The second issue is whether the defendants' actions in depriving Willis of the book (Def. Ex. C) violated his right to due process, or stated differently, whether CCUSO's application of its mail-handling policy in this instance was constitutional.

III. ANALYSIS

A. Overview of Civil Rights Claims Under 42 U.S.C. § 1983

Title 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United

> States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 was designed to provide a "broad remedy for violations of federally protected civil rights." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 685, 98 S. Ct. 2018, 2033, 56 L. Ed. 2d 611 (1978). However, section 1983 provides no substantive rights. *Albright v. Oliver*, 510 U.S. 266, 271, 114 S. Ct. 807, 811, 127 L. Ed. 2d 114 (1994); *Graham v. Conner*, 490 U.S. 386, 393-94, 109 S. Ct. 1865, 1870, 104 L. Ed. 2d 443 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617, 99 S. Ct. 1905, 1916, 60 L. Ed. 2d 508 (1979). "One cannot go into court and claim a 'violation of § 1983' — for § 1983 by itself does not protect anyone against anything." *Chapman*, 441 U.S. at 617, 99 S. Ct. at 1916. Rather, section 1983 provides a remedy for violations of all "rights, privileges, or immunities secured by the Constitution and laws [of the United States]." 42 U.S.C. § 1983; *see Albright*, 510 U.S. at 271, 114 S. Ct. at 811 (section 1983 "merely provides a method for vindicating federal rights elsewhere conferred"); *Graham*, 490 U.S. at 393-94, 109 S. Ct. at 1870 (same); *Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S. Ct. 2502, 2504, 65 L. Ed. 2d 555 (1980) ("Constitution and laws" means section 1983 provides remedies for violations of rights created by federal statute, as well as those created by the Constitution).

To state a claim under 42 U.S.C. § 1983, Willis must establish two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States, and (2) the alleged deprivation was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 2254-55, 101 L. Ed. 2d 40 (1988); *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 1913, 68 L. Ed. 2d 420

(1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330, 106 S. Ct. 662, 664, 88 L. Ed. 2d 662 (1986).

The defendants here have conceded jurisdiction under section 1983 (Doc. No. 6, p. 2), and they do not claim they were acting other than under color of state law. They have asserted the affirmative defense of qualified immunity to the plaintiff's claims. (*Id.*, p. 3) However, qualified immunity "cannot serve as a defense to an equitable claim such as the claim for injunctive relief in this case." *Williams v. Delo*, 49 F.3d 442, 445 (8th Cir. 1995) (citing *Tubbesing v. Arnold*, 742 F.2d 401, 403-04 (8th Cir. 1984)).

B. Are CCUSO's Mail and Grievance Policies Constitutional?

1. Prisoner or patient?

Willis frames this issue in terms of defining his status as a prisoner, rather than as a patient, at CCUSO. He argues there is no major difference between the CCUSO unit and a prison, and he therefore should be entitled to at least the same rights as prison inmates receive. He testified that security protocols on the CCUSO unit are actually stricter than the prison security protocols. In prison, he was able to go to the gym, recreational hall, music center, and counselor's office, and generally roam around the compound freely. He could go pick up his mail and laundry, and go eat his meals when he chose (within certain specified time frames). In contrast, he stated that on the CCUSO unit, there are security cameras everywhere, including in the isolation rooms, and doors have to be clicked open by unit personnel before patients can go to different areas. However, Willis acknowledged that on the CCUSO unit, patients can move about freely on their assigned floor, which includes their individual rooms and a kitchen, dining area, television viewing area, and crafts room. Willis wears street clothes, rather than a uniform, and he can make phone calls to persons on his approved calling list.

On the issue of mail handling, Willis testified the prisons have a policy that provides for prompt notice to a prisoner if the prisoner receives something in the mail that the administration deems to be contraband. The prisoner then has three days to send the contraband back out, or there is an appeal process the prisoner can utilize. A list of approved publications prisoners are allowed to receive is posted in the prison library. Willis argues the mail-handling policies and procedures at the CCUSO unit are more restrictive than those in prison, and violate his due process rights. In particular, he argues the defendants were required to use "considered judgment" in restricting his mail, and their actions must "'bear some reasonable relation to the purpose for which persons are committed.'" (Doc. No. 25, unnumbered p. 2, quoting *Seling v. Young*, 531 U.S. 250, 265, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001)) He argues CCUSO does not have a clear policy regarding mail handling, and they failed to follow the policy that does exist in withholding the book from him.

The defendants argue Willis has missed the point. They assert that the determination as to whether civilly-committed persons are considered "mental patients" or "prisoners" is irrelevant because in either event, the constitutional analysis required in this case would be the same. They argue the mail restrictions at CCUSO support the interests of "security and the orderly operation of the treatment programs for the resident population," and such restrictions "are constitutionally permissible even as applied to . . . mental patients." (Doc. No. 22, pp. 2-3, citing *Taylor v. Sterrett*, 532 F.2d 462, 470 n.11 (5th Cir. 1976); *Davis v. Balson*, 461 F. Supp. 842, 863 (N.D. Ohio 1978))

The relevance of Willis's status as either a "mental patient" or a "prisoner" is not as clear as the defendants suggest. As Willis points out in his brief, the United States Supreme Court has observed that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals

whose conditions of confinement are designed to punish." *Youngberg v. Romeo*, 457 U.S. 307, 321-22, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28 (1982) (citing, as analogous, *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976)). Thus, it would seem to follow that permissible restrictions on incoming mail would be fewer for persons under involuntary commitment than for prisoners. The court therefore finds it would be beneficial to examine the status of persons such as Willis, who have been civilly committed under Iowa's sexual offender statute.

As the parties point out, there is very little law regarding the status and rights of persons who are civilly committed to these types of residential, post-incarceration sexual treatment programs. Only one circuit court of appeals has addressed the issue head-on, but not in the context of defining such persons' constitutional rights. In *Kalinowsky v. Bond*, 358 F.3d 978 (7th Cir. 2004), the court considered whether persons civilly committed to programs like the one at CCUSO are subject to the exhaustion and "three strikes" provisions of the Prisoner Litigation Reform Act ("PLRA"). The court held a person confined under the Illinois Sexually Dangerous Persons Act was a "prisoner" for purposes of the PLRA. *Id.* The case differs from Willis's, however, in that the felony drug charges against Kalinowsky were being held in abeyance during his treatment for mental illness under the Illinois statute. Willis has already been convicted and has completed his sentence. His confinement at CCUSO under the Iowa statute began after his term of incarceration had ended.

The Eighth Circuit has found error in treating as a "prisoner" a person who is confined in a state mental institution after being found not guilty of criminal charges by reason of insanity. *See Kolocotronis v. Morgan*, 247 F.3d 726 (8th Cir. 2001). In *Kolocotronis*, the court held that because the person was found not guilty by reason of insanity, he did not fall within the statutory definition of "prisoner" for purposes of

considering his application to proceed *in forma pauperis*. The court held the person was "a mental patient, not a convict," and therefore, "the assessment of filing fees, both in the trial court and on appeal, needs to be reconsidered. The plaintiff is simply an ordinary civil litigant seeking to proceed *in forma pauperis*. He is not subject to the detailed inmate-account procedures of [28 U.S.C.] § 1915, nor is he subject to the three-strikes rule found in subsection (g) of that section." *Kolocotronis*, 247 F.3d at 728.

Kolocotronis is not directly on point in addressing the current questions. In that case, the person was not "incarcerated or detained in any facility [after being] accused of, convicted of, sentenced for, or adjudicated delinquent for" a crime, and thus he was not a "prisoner" as defined by the PLRA. *See* 28 U.S.C. § 1915(h); 28 U.S.C. § 1915A(c). Rather, he was found not guilty by reason of insanity. In contrast, an inmate who is civilly committed as a sexually violent predator is someone who "has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility." Iowa Code § 229A.2(11). When such an individual has been "convicted of" a crime and is "detained in [a] facility" pursuant to commitment as a sexually violent predator, it would appear the individual would be considered a "prisoner," at least for purposes of the PLRA.

For purposes of considering the rights of persons civilly committed under Iowa's sexually violent predator statute, the court finds the status of such persons is substantially similar to that of prisoners, and therefore the court may look to the case law interpreting prisoners' rights in considering the issues raised by Willis in his complaint. Notably, that case law supports the defendants' assertion that the analysis in this case is the same whether Willis is viewed as a "prisoner" or a "mental patient"; that is, the mail-handling procedures at CCUSO must be reasonably related to the legitimate interests of

institutional administration . *See Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64 (1987); *Davis v. Balson*, 461 F. Supp. 842, 864 (N.D. Ohio 1978).

2. CCUSO's policies regarding patients' mail

The United States Supreme Court has recognized that a "delicate balance" exists between the rights of publishers and others who seek to enter the institutional environment, whether in person or by means of writings, and the concerns of order and security within the institution. In the prison context, the Court noted "prison officials may well conclude that certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison." *Thornburgh v. Abbott*, 490 U.S. 401, 407, 109 S. Ct. 1874, 1978, 104 L. Ed. 2d 459 (1989). "Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, [the] Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world." *Id.*, 490 U.S. at 407-08, 109 S. Ct. at 1878-79 (citing *Procunier v. Martinez*, 416 U.S. 396, 404-05, 94 S. Ct. 1800, 1807, 40 L. Ed. 2d 224 (1974)). The Court noted the *Turner* standard of reasonableness is necessary if institutional administrators, "and not the courts, [are] to make the difficult judgments concerning institutional operations." *Thornburgh*, 490 U.S. at 409, 109 S. Ct. at 1879 (internal quotation marks omitted) (citing *Turner*, 482 U.S. at 89, 107 S. Ct. at 2261)).

In considering the *Thornburgh* and *Turner* reasonableness standard, both Willis and the defendants have cited *Davis v. Balson* as authoritative on the issue presented here. In that case, inmates of a maximum security hospital facility for the criminally insane alleged a number of the institution's procedures were unconstitutional. Among

other things, the court considered the question of whether the institution's mail-handling policies were constitutional. With regard to incoming mail, all first class mail was opened in the business office and inspected for contraband and money, outside the presence of the patients. The incoming mail was not read or censored. Incoming packages were opened in the mail room, their contents were itemized, and a receipt was sent to both the receiving inmate and the sender of the package. This also was done outside the patients' presence. Patients could only receive periodicals and books that were mailed directly from the publisher. The plaintiffs in the case argued these practices violated their First and Fourteenth Amendment rights "by imposing greater limitations upon First Amendment freedoms than are necessary for the protection of the state's recognized interests in security, order and rehabilitation." *Davis*, 461 F. Supp. at 863.

In finding the practice of opening patients' mail outside their presence to be unconstitutional, the *Davis* court relied on the standard articulated by the United States Supreme Court in *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974). The Supreme Court overruled *Martinez* in *Thornburgh*, noting the *Martinez* analysis must "be limited to regulations concerning *outgoing* correspondence." *Thornburgh*, 490 U.S. at 413, 109 S. Ct. at 1881 (emphasis added). The Court's subsequent decisions abandoned the "least restrictive alternative" approach of *Martinez*, and "adopted a standard of review that focuses on the reasonableness of prison regulations: the relevant inquiry [being] whether the actions of prison officials were 'reasonably related to legitimate penological interests[.]'" *Id.*, 490 U.S. at 409, 109 S. Ct. at 1879 (citing *Turner*, 482 U.S. at 89, 107 S. Ct. at 2261).

Despite the outdated standard of review utilized by the *Davis* court, that court's discussion of the rights of pretrial detainees is useful in evaluating Willis's claims in light of his prisoner-versus-patient argument. The *Davis* plaintiffs argued the constitutional

validity of the institution's mail practices should be subjected to more rigorous scrutiny as applied to patients who had not been convicted of a crime. The court discussed the plaintiffs' status vis-á-vis pretrial detainees as follows:

> Plaintiffs rely on that line of cases which has recognized that pretrial detainees do not stand on the same footing as convicted inmates, and therefore may not be subjected to any greater restrictions than those which inhere in confinement itself, or which are justified by compelling necessities of jail administration. [Citations omitted.]
>
> The Court is in full accord with the general notion that pretrial detainees may suffer fewer privations than convicted inmates. Where, however, the sole interest advanced in support of an institutional restriction is Security, the reasons which otherwise require differences in treatment between categories of inmates are not present. *See Taylor v. Sterrett*, 532 F.2d 462, 470 n.11 (5th Cir. 1976). Restrictions which are shown to be necessary to further the governmental interest in maintaining custody, maintaining security, and maintaining internal order and discipline are constitutionally permissible even as applied to detainees, notwithstanding the fact that such restrictions may be viewed as having a punitive effect. "A pretrial detainee constitutionally need not, and, as a practical matter, cannot be provided with a normal civilian life." *Padgett v. Stein*, 406 F. Sup. 287 (M.D. Pa. 1975).
>
> The patients at [the institution in question] have been involuntarily committed to the custody of the state. Moreover, most, if not all, patients at [the institution] have demonstrated violent or dangerous behavior to warrant their confinement there. Security is, as noted above, a legitimate concern of the institution. . . .

Davis, 461 F. Supp. at 863-64.

Similarly, in the present case, the court finds the institutional interests of maintaining security and maintaining the integrity of the treatment environment warrant

restrictions that may, in some cases, be more restrictive than those applied to inmates in a prison population. The reason individuals are committed to CCUSO and similar institutions is to receive treatment for their proclivity to engage in sexually violent behavior that represents a danger to society. Both security and the integrity of the treatment process are legitimate concerns of the institution in formulating policies designed to further the programs' goals. The court therefore finds the reasonableness standard articulated in *Turner* and *Thornburgh* should be applied in evaluating CCUSO's mail policies in the present case. In examining those policies, the court notes Willis complains not only that the mail policy itself is insufficient, but also that the grievance procedure is inadequate to afford him relief if he disagrees with a decision to withhold mail from him.

The first task before the court, therefore, is to set forth the CCUSO policies applicable at the time the book was mailed to Willis. At that time, the Patient Handbook set forth the following under the category of Patients' Rights:

> 2. The right to be informed about treatment plans and hospital rules and regulations regarding individual conduct as a patient.
>
> . . .
>
> 7. The right to the lest restrictive conditions necessary to achieve the purposes of treatment. . . .
>
> . . .
>
> 20. The right to have access to current informational and recreational media, e.g., newspapers, television, or periodicals, in keeping with the patient[']s treatment program.
>
> . . .
>
> 22. The right to unimpeded, private, and uncensored communication with others by mail and telephone and with persons of the

> patient's choice except when therapeutic or security reasons dictate otherwise. Any limitations or restrictions imposed shall be approved by the director or designee, and the reasons noted shall be made a part of the patient's record.

(Def. Ex. D, pp. 3-4)

The handbook contains specific Mail Procedures, including the following:

> General: The Mail Room is responsible for sorting all incoming and outgoing mail, parcels, and periodicals. All U.S. Postal regulations shall be followed and current rates and regulations apply. . . . Mail is delivered daily, Monday through Friday and will not be retained for more than 24 hours before distribution, excluding Sundays and holidays. Unless there is a reasonable belief that some limitation is needed to protect public safety or the security and orderly operation of the unit, there will be no limit on the source, destination, amount, or content of incoming or outgoing social mail a patient may receive or send. . . . All incoming and outgoing mail is inspected for contraband . . . but is not read by institutional or program staff. . . . If the CCUSO Director has reason to suspect that the patient is . . . engaging in countertherapeutic communication with outside individuals, the Director may place that patient on the CCUSO Readable Mail List. This means that outgoing and incoming mail (with the exception of legal mail) will be scanned by a staff member for inappropriate content before mailing the item or giving it to the patient. . . . All items of contraband discovered in either incoming or outgoing mail shall be forwarded to the Treatment Services Director. In doing so, a proper chain of evidence is to be maintained at all times.

(Def. Ex. D, pp. 19-20)

The handbook identifies contraband as "[a]ny item that is not explicitly identified in this handbook or in another written document as allowable for patients[.]" Items

deemed contraband are not allowed and will be confiscated, including "literature deemed counter-therapeutic." (*Id.*, p. 16)[1]

The available grievance process was set forth above in this opinion. As noted previously, although the Patient Handbook in place at the time of this incident allowed for the submission of a written grievance, *see* Def. Ex. D at 17-18, Willis relied on Smith's statements at the December 2003, unit meeting in believing the written grievance procedure was no longer available to him. Whether accurate or not, the court finds Willis's belief was reasonable, and also finds he pursued those avenues of appeal he believed to be open to him. The court therefore rejects the defendants' argument that Willis's complaint should be dismissed because he failed to follow the available grievance procedure. (*See* Doc. No. 22, pp. 7-9)

The court next turns to application of the *Turner/Thornburgh* factors to the CCUSO mail-handling and grievance policies. The Eighth Circuit Court of Appeals has summarized the test as follows:

> The law is settled that prison regulations which restrict an inmate's access to publications are constitutionally valid if they are "reasonably related to legitimate penological interests." *Thornburgh v. Abbott*, 490 U.S. 401, 404, 109 S. Ct. 1874, 1876, 104 L. Ed. 2d 459 (1989). In determining the reasonableness of a prison regulation, this court must consider: (1) whether a rational connection exists between the regulation and a neutral, legitimate government interest; (2) whether alternative means exist for inmates to exercise the constitutional right at issue; (3) what impact the accommodation of the right would have on inmates, prison personnel,

[1]In the April 1, 2004, revised Patient Handbook, the definition of contraband has been revised to include "[a]ny item deemed counter-therapeutic by the Clinical Director." (Def. Ex. E, Bates stamp #000271) In addition, the mail policy has been revised to provide that all packages will be "opened in front of the patient." (*Id.*, Bates stamp #000364)

> and allocation of prison resources; and (4) whether obvious, easy alternatives exist. *See Turner v. Safley*, 482 U.S. 78, 89-91, 107 S. Ct. 2254, 2261-62, 96 L. Ed. 2d 64 (1987); *Thornburgh*, 490 U.S. at 414-19, 109 S. Ct. at 1881-84.

Dawson v. Scurr, 986 F.2d 257, 260 (8th Cir. 1993).

Applying the first factor to the CCUSO mail policy, the court "must determine whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective." *Thornburgh*, 490 U.S. at 414, 109 S. Ct. at 1882. The defendants claim their purposes underlying the policies at issue are the safety and security of patients on the CCUSO unit, and maintaining the integrity and efficacy of the treatment process.

As was the case in *Thornburgh*, the court here finds the legitimacy of CCUSO's purposes in promulgating its mail and grievance policies is beyond question. The regulations are aimed at providing patients with the broadest possible rights while maintaining their security and protecting the treatment environment. *See Thornburgh*, 490 U.S. at 415, 109 S. Ct. at 1882.

The next question is whether the mail policy, to the extent it restricts patient's First Amendment rights, operates "'in a neutral fashion, without regard to the content of the expression.'" *Id.* (quoting *Turner*, 482 U.S. at 90, 107 S. Ct. at 2262). The defendants here claim the content of the book would be counter-therapeutic – obviously, then, the policy is not "content neutral." But as the *Thornburgh* Court explained, just because the policy allows for decisions based on content does not mean the policy is unconstitutional:

> [T]he Court's reference to "neutrality" in *Turner* was intended to go no further than its requirement in *Martinez* that "the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression." [*Martinez*,] 416 U.S. at 413, 94

S. Ct. at 1811. [N13] Where, as here, prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are "neutral" in the technical sense in which we meant and used that term in *Turner*. [N14]

> [N13] Indeed, the Court upheld content distinctions in *Jones [v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977)], where internal distribution of a prisoners' union's materials was prohibited while distribution of materials from the Jaycees and Alcoholics Anonymous was permitted. 433 U.S. at 131, n.8, 97 S. Ct. at 2540, n.8. It upheld these distinctions against an equal protection challenge because the distinctions had a rational basis in the legitimate penological interests of the prisons: in contrast with the prisoners' union, the Jaycees and Alcoholics Anonymous "were seen as serving a rehabilitative purpose, working in harmony with the goals and desires of the prison administrators, and both had been determined not to pose any threat to the order or security of the institution." *Id.*, at 134, 97 S. Ct. at 2542.
>
> [N14] In contrast, the censorship at issue in *Martinez* closely resembled the kind of censorship which is expressly *prohibited* by the regulations presently at issue. In *Martinez*, the regulations barred writings that "unduly complain" or "magnify grievances," express "inflammatory political, racial, religious or other view," or are "defamatory" or "otherwise inappropriate." 416 U.S. at 415, 94 S. Ct. at 1812. We found in *Martinez* that "[t]hese regulations fairly invited prison officials and employees to

> apply their own personal prejudices and opinions as standards for prisoner mail censorship," and that the purpose of the regulations had not been found "unrelated to the suppression of expression." *Ibid*. The regulations at issue in *Martinez*, therefore, were decidedly not "neutral" in the relevant sense.

Thornburgh, 490 U.S. at 415-16 & nn. 13, 14, 109 S. Ct. at 1882-83 & nn. 13, 14. *See Dawson*, 986 F.2d at 261 ("[W]hen prison administrators distinguish between publications on the basis of their potential implications for prison security and rehabilitation . . . they are 'neutral.'") (quoting *Thornburgh*, 490 U.S. at 415-16, 109 S. Ct. at 1882-83).

Considerations related to maintaining the integrity of the treatment process are substantially similar to those related to rehabilitation, and the analysis here should be the same. The *Thornburgh* Court found it appropriate to give prison authorities broad discretion in regulating incoming publications because such a policy was "rationally related to security interests." *Id.*, 490 U.S. at 416, 109 S. Ct. at 1883. *See Dawson*, 986 F.2d at 261 ("We are cautioned that courts should be particularly conscious of the measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.") (internal quotation marks, citations omitted). The court finds a similar measure of discretion should be afforded to the mental health professionals at CCUSO in terms of regulating what types of incoming publications are permissible. *Cf. Parham v. J.R.*, 442 U.S. 584, 608, 99 S. Ct. 2493, 2507, 61 L. Ed. 2d 101 (1979) ("'[N]either judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments.'") (quoting *In re Roger S.*, 19 Cal. 3d 921, 942, 141 Cal. Rptr. 298, 311, 569 P.2d 1286, 1299 (1977) (Clark, J., dissenting)). Such a policy is rationally

related not only to patient security, but also, and equally important, to maintaining the integrity of the treatment process.

Giving the administrators this type of authority does not, however, address the question of whether patients' mail may be opened and examined for contraband outside the recipients' presence. Here, the court agrees with the holding of *Davis v. Balson*, 461 F. Supp. 842 (N.D. Ohio 1978), where the court found that "the opening of mail in the patient's presence poses only an administrative problem for the institution, and not a true security problem." *Id.*, 461 F. Supp. at 865. The *Davis* court found "the opening of mail . . . outside the presence of the patient to inspect for contraband is constitutionally impermissible." *Id.* (citing *Preston v. Cowan*, 369 F. Supp. 14 (W.D. Ky. 1973); *Hardwick v. Ault*, 447 F. Supp. 1661, 130 (M.D. Ga. 1978)). Although the *Davis* court relied on *Martinez* in so holding, the analysis is equally valid under the *Thornburgh* standard. The defendants have not advanced any legitimate institutional interest for opening packages outside the patients' presence; indeed, they concede that the only reason they did so in this case was because of the influx of packages over the holiday season. Furthermore, the institution has since made opening packages in the patients' presence a part of its written policy. (*See* Ex. E, p. 21, providing, "All packages are opened in front of the patient."[2])

Thus, the court finds Willis should prevail on his claim that his rights were violated when the package containing the book was opened outside his presence. However, because Willis seeks only injunctive relief in this action, and because the defendants have

[2]Notably, the defendants indicated they are reconsidering this policy in light of one patient's recent receipt of some cutlery in the mail. The court notes appropriate procedures could be put in place to prevent a patient from handling package contents until they have been examined while still providing for the opening of packages in the patient's presence, and such a procedure would comport with the constitutional safeguards articulated by the *Thornburgh* Court.

instituted a written policy of opening all packages in front of the recipient, Willis's claim for relief is moot on this point.

Returning to the *Thornburgh* analysis of CCUSO's mail procedure, having found the procedure meets the first element of the test, the next question is whether alternative means exist for the patients to exercise their constitutional right to access to communications from various sources. Willis has not proposed any alternate procedure beyond having all packages opened in patients' presence, a procedure that has been implemented by the institution. The analysis regarding the particular book in question will be discussed below, in the context of whether CCUSO applied its procedure in a constitutional manner.

Similarly, the remainder of the *Thornburgh* analysis is not implicated by Willis's complaint in this case. In any event, the court finds that although CCUSO's opening of Willis's mail outside his presence was unconstitutional, the current mail policies at CCUSO pass constitutional muster in all respects. Therefore, although the court recommends judgment be entered in Willis's favor on this issue, his is a somewhat hollow victory because there is no relief to be granted.

3. CCUSO's grievance policies and procedures

Turning to the grievance policies and procedure at CCUSO, the Eighth Circuit has "recognized the First Amendment right to petition for redress of grievances[.]" *Dixon v. Brown*, 38 F.3d 379 (8th Cir. 1994) (citing *Sprouse v. Babcock*, 870 F.2d 450 (8th Cir. 1989)). However, "the Constitution does not obligate the state to establish a grievance procedure[.]" *Sprouse v. Babcock*, 870 F.2d 450, 452 (8th Cir. 1989). CCUSO had, and has, a grievance procedure for patients to raise their concerns. Whether the procedure is clear or not, and whether the procedure meets with Willis's approval or not, the

existence of the procedure does not confer any substantive right upon Willis that would entitle him to relief under section 1983. "The simple fact that state law prescribes certain procedures does not mean that the procedures thereby acquire a federal constitutional dimension." *Buckley v. Barlow*, 997 F.2d 494 (8th Cir. 1993) (internal quotation marks, citations omitted).

Further, the present lawsuit evidences the fact that the grievance policies and procedures clearly do not affect adversely patients' right of access to the courts.

The court finds Willis has not proved CCUSO's grievance procedures have violated his constitutional rights, and he is not entitled to relief on this claim.

C. Was the application of CCUSO's mail policy constitutional in this instance?

The second question raised by Willis's complaint is whether CCUSO's decision to deny him access to the book was constitutional. The legal issue, therefore, is whether CCUSO's mail policy is unconstitutional as applied to Willis in this instance. Analysis under the first *Thornburgh* factor is the same – the policy of making individual determinations regarding the potential impact of a publication's content on the security and treatment environment at the institution is rationally related to neutral, legitimate institutional interests. Willis's complaint implicates the subsequent factors in the analysis.

The second factor to be addressed under the *Thornburgh* analysis is whether alternative means exist for Willis to exercise the right at issue. Willis suggests a couple of alternatives. First, he suggests, and the defendants' trial testimony indicates they would agree, that Willis is intelligent enough to separate the "wheat from the chaff" in the book in question. Therefore, Willis argues no harm would come to his treatment if

the book were given to him. However, as the *Dawson* court observed, once a suspect publication enters the unit, it can be expected to circulate among the other patients. *See Dawson*, 986 F.2d at 261 (citing *Thornburgh*, 490 U.S. at 412, 109 S. Ct. at 1881). Similarly, if Willis is allowed to read the book in an isolated location, rather than allowing him to retain possession of the book, it is reasonable to expect that the book's indictment of the polygraph process would be discussed on the unit.

Here, again, the court must return to the appropriate deference due the decisions of the institution's administrators "and appropriate recognition [of] the peculiar and restrictive circumstances of [the patients'] confinement." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 125, 135, 97 S. Ct. 2532, 2537, 53 L. Ed. 2d 629 (1977). The very fact of Willis's and the other patients' confinement in the CCUSO unit imposes limitations on their constitutional rights, including those derived from the First Amendment. *Id.*, 97 S. Ct. at 2537-38. Furthermore, where the institution in question is a state institution, "federal courts have a further reason for deference to the appropriate . . . authorities." *Id.*, 433 U.S. at 136, 97 S. Ct. at 2538. Thus, the court defers to the CCUSO administrators' decision that giving Willis access to the entire book would have a potentially detrimental impact on the integrity of the treatment process on the unit.

Willis suggests a second alternative that deserves closer scrutiny. He suggests those portions of the book which the CCUSO administrators find objectionable could be withheld, and the remainder of the book could be delivered to him. When Pat Steflik was asked during her testimony to review the table of contents and glance briefly at portions of the book, she stated several portions of the book likely would not be objectionable. Steflik and Smith both agreed that although they would prevent patient access to information about polygraph countermeasures, patients have a right to hear both sides of the argument regarding the validity of polygraph examinations. In the present case,

however, Smith objected to those arguments being presented by means of materials published by AntiPolygraph.org. For example, Smith specifically stated he would allow Willis to have access to a National Academy of Sciences report and various governmental policies relating to polygraphs that are referenced in the book if the information came directly from those organizations instead of from the publishers of the book in question. He further offered to obtain materials discussing both sides of the polygraph issue from what he deems to be legitimate sources, and to provide those materials for patients' reference and discussion, although he indicated he had taken no steps to locate or provide such materials.

The court finds this application of the institution's policy to be unconstitutional. The defendants have offered no reasonable professional judgment to justify picking and choosing between the *sources* from which patients may obtain information. If the content of the information is appropriate and not detrimental to the institution's security or the patients' treatment, then restricting the sources from which the information may be obtained appears to this court to be based on the administrators' personal biases and prejudices rather than upon their professional judgment. *See Thornburgh*, 490 U.S. at 416 n.14, 109 S. Ct. at 1883 n.14. The defendants did not testify to any "reasonably founded fears" of consequences that might arise from providing Willis with the book with the objectionable portions removed, *see Thornburgh*, 490 U.S. at 419, 109 S. Ct. at 1884-85, and the court finds this less-restrictive alternative would serve the interests of protecting the security and treatment environment in the institution, while protecting the patients from unreasonable restraints. *See id.; Youngberg v. Romeo*, 457 U.S. 322, 321, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28 (1982); *cf. Cameron v. Tomes*, 783 F. Supp. 1511, 1526 (D. Mass. 1992) (it is court's duty to ensure treatment choices are based on exercise of professional judgment).

In his brief, Willis has raised several other arguments regarding his right to receive the anti-polygraph information contained in the book. He cites to and quotes from several sources, including the United States Supreme Court and the Iowa Supreme Court, that question the validity of polygraph examinations. He likens CCUSO's withholding of the information to the violation of a patient's right to informed consent about treatment options and the right to refuse treatment, if desired. However, Willis offered no expert testimony at trial regarding the specific content at issue here. In the absence of contrary evidence, this court defers to the defendants' professional judgment that those portions of the book dealing with polygraph countermeasures would be counter-therapeutic. *See Cameron*, 783 F. Supp. at 1526 (where no contrary professional evidence is offered, court appropriately should follow professional judgment expressed at trial).

The next *Thornburgh* factor before the court is what impact it would have on the patients, administrators, and allocation of institutional resources, for the CCUSO administrators to remove the portions of the book dealing with countermeasures, and to give the remainder of the material to Willis. Given the existence of this lawsuit, it seems highly likely the patients already are aware that differing views exist regarding the validity of polygraphs. Indeed, the fact that the patients on the unit have been convicted of crimes and have spent time in prison almost guarantees that they have engaged in discussions regarding the validity of polygraph examinations. The court does not believe the defendants' fears are reasonable that exposure to additional information questioning the validity of the test will cause patients suddenly to refuse to take polygraphs. Allowing patients access to these materials will offer the defendants an opportunity to discuss their treatment methodology with patients, to discuss the pros and cons of using polygraphs as part of their treatment plan, and allow patients to make decisions regarding their own treatment. As Willis notes in his brief, patients have the right to refuse treatment if they

so desire, cognizant of the consequences such a refusal would entail (*e.g.*, the likelihood that the patient would never leave the institution, and the loss of privileges resulting from stagnation in a lower treatment level). The court finds the impact on patients would be minimal, certainly not great enough to justify the constitutional violation inherent in denying Willis access to the materials.

In addition, although it will take time for the CCUSO staff to review the book completely and remove the offending portions, such a review is required in any event before a reasoned professional judgment can be made to withhold materials from a patient. Thus, there is no greater impact upon the administrators or institutional resources than would be required if the redacted materials were withheld.

The last *Thornburgh* factor is whether any obvious, easy alternatives exist. Neither party has suggested other alternatives, and the court will not speculate on what such alternatives might entail.

To summarize, then, the court finds as follows:

1. Willis's rights were violated when his package was opened outside of his presence; however, because the defendants have instituted a policy that provides for all packages to be opened in the recipients' presence, there is no remedy to be afforded Willis for the violation.

2. The defendants' argument that Willis's complaint should be dismissed because he failed to follow the available grievance procedure is overruled. The court finds Willis followed those procedures he believed to be available to him.

3. The grievance policies and procedures at CCUSO are constitutional, and Willis has failed to state a claim for violation of section 1983 in connection with those policies and procedures.

4. The defendants' review of written materials to determine whether the materials could have an adverse effect on the treatment process or the unit's security is constitutional so long as such decisions are made in the exercise of reasoned professional judgment, and not on the basis of the defendants' personal biases and prejudices.

5. Willis should be given the book (Def. Ex. C), with the portions removed that the defendants have determined would be counter-therapeutic. In the court's view, this would include sections 3 and 4, and Appendices A, B, and F. Willis should be notified in writing of what portions of the book are being withheld, what subjects those portions discuss, and the professional judgment underlying the decision to withhold those portions.

IV. CONCLUSION

For the reasons discussed above, IT IS RESPECTFULLY RECOMMENDED, unless any party files objections[3] to the report and recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b) within ten (10) days of the service of a copy of this report and recommendation, that judgment be entered in favor of Willis and against the defendants on the issue of the defendants' violation of Willis's constitutional rights in opening his package outside of his presence, and in withholding the entirety of the book from him on the basis of the organization that published the book. The court recommends Sections 3 and 4, and Appendices A, B, and F, be removed from the book, and the balance of the book be given to Willis.

[3] The parties must specify the parts of the report and recommendation to which objections are made. In addition, the parties must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356, 357-58 (8th Cir. 1990).

The court further recommends judgment be entered in favor of the defendants and against Willis on the issue of whether the defendants' grievance policies and procedures violated Willis's rights, and the issue of whether the defendants have the general right to make decisions based on treatment and security concerns with respect to printed materials to which they will allow the CCUSO patients access.

IT IS SO ORDERED.

DATED this 28th day of February, 2005.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT